

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLANT**



# 76-6017

To be argued by  
Powell Pierpoint

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 76-6017

UNITED STATES OF AMERICA,

Plaintiff,

- against -

INTERNATIONAL BUSINESS MACHINES  
CORPORATION,

Defendant.

FELIX KAUFMAN,

Appellant.

- against -

UNITED STATES OF AMERICA,

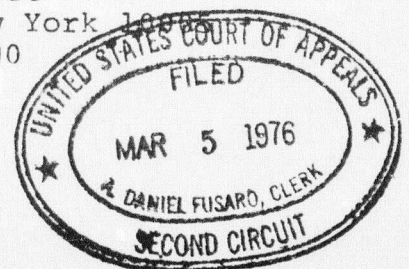
Plaintiff-  
Appellee.

On Appeal from the United States District Court  
for the Southern District of New York

BRIEF OF APPELLANT, FELIX KAUFMAN

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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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FELIX KAUFMAN,

Petitioner,

-against-

HON. DAVID N. EDELSTEIN, CHIEF JUDGE,  
United States District Court for the  
Southern District of New York, UNITED  
STATES DISTRICT COURT FOR THE SOUTHERN  
DISTRICT OF NEW YORK, UNITED STATES OF  
AMERICA, and INTERNATIONAL BUSINESS  
MACHINES CORPORATION,

Respondents.

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FELIX KAUFMAN,

Appellant,

-against-

UNITED STATES OF AMERICA,

Appellee.

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PETITION FOR EXTRAORDINARY WRIT  
PURSUANT TO 28 U.S.C. § 1651 AND  
FED. R. APP. P. 21 AND APPELLANT'S  
BRIEF

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF  
APPEALS FOR THE SECOND CIRCUIT:

Felix Kaufman seeks a writ of mandamus pursuant to  
28 U.S.C. § 1651 and Rule 21, Fed. R. App. P. ordering Chief Judge  
David N. Edelstein, sitting in United States v. International

Business Machines Corp., 69 Civ. 200, Civ. No. 72-344, now on trial, to vacate an order entered by him on December 8, 1975 denying Mr. Kaufman's motion to quash and vacate a subpoena served upon him by the United States (the "government"). The government's subpoena directs Mr. Kaufman to appear at the trial and testify on behalf of the government as its expert witness.

Mr. Kaufman has proceeded by petitioning for a writ of mandamus because the law in this Circuit appears unsettled as to whether the District Court's order is appealable. Mr. Kaufman has also filed a Notice of Appeal pursuant to 28 U.S.C. § 1291, and this document will serve as the appellant's brief on that appeal as well as his petition for the extraordinary writ. Because of its dual nature, this document will deal first with the reasons why the decision below should be reversed or vacated, and thereafter with the procedural questions concerning this Court's jurisdiction to reach that result.

#### The Issues Presented and the Relief Sought

This proceeding presents the following issues:

(1) Whether the District Court has the power to compel an expert witness to testify concerning his expert opinion without compensation for his services, absent unusual circumstances such as the unavailability of another expert;

(2) Assuming the power of the District Court to compel an expert to testify in certain circumstances, whether Judge Edelstein misconceived the nature of his discretion and acted outside the range of his power;

(3) Whether the order of the District Court is appealable; and

(4) Whether a writ of mandamus is appropriate.

In the alternative, Mr. Kaufman seeks either a reversal on appeal of the decision denying the motion or the issuance of a writ of mandamus directing Chief Judge Edelstein (a) to vacate his order denying Mr. Kaufman's motion to quash and (b) to grant that motion.

#### Statement of Facts

On February 18, 1975, the United States served a subpoena upon Felix Kaufman directing him to appear at the trial of United States v. IBM, a civil action alleging violations of the antitrust laws, and testify on behalf of the government. Mr. Kaufman is the National Director of Management Consulting Services for Coopers & Lybrand (which is not a party to United States v. IBM) and is an expert on the electronic data processing industry. Mr. Kaufman has no knowledge of the facts upon which the government's case depends, and the government has admitted that his testimony is sought as an expert witness.\*

Mr. Kaufman does not wish to make his expert services available to the government in connection with United States v. IBM and accordingly moved on September 16, 1975 to quash the government's subpoena.

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\* See Affidavit of Eugene M. Katz, Esq., sworn to September 10, 1975, Par. 8, set forth in the Appendix to the Petition, Tab 1 and in the Appendix to the Briefs, P. 11A.

By memorandum decision dated December 8, 1975, the court below denied Mr. Kaufman's motion to quash. On December 29, 1975, Mr. Kaufman moved for an order permitting Mr. Kaufman to file an appeal pursuant to 28 U.S.C. § 1292(b). That motion was denied by a memorandum decision filed December 30, 1975.

#### Argument

I. THE SUBPOENA SERVED BY THE GOVERNMENT ON MR. KAUFMAN WAS ISSUED WITHOUT AUTHORITY AND MUST BE QUASHED AND VACATED

For more than one hundred years it has been the general rule in the federal courts that an expert should not be compelled to testify against his wishes. See, e.g., Ex parte Roelker, 1 Sprague 276, Fed. Cas. No. 11995 (D.C. Mass. 1854); United States v. Howe, Fed. Cas. No. 15404a (W.D. Ark. 1881); Smith v. United States, 24 Ct. Cl. 209 (1889); Boynton v. R. J. Reynolds Tobacco Co., 36 F. Supp. 593 (D. Mass. 1941); Friedman v. Renault, 11 F.R. Serv. 2d 30b. 31, case 4 (S.D.N.Y. 1967); Karp v. Cooley, 349 F. Supp. 827, 836-837 (S.D. Tex. 1972), aff'd, 493 F.2d 408, 424-425 (5th Cir.), cert. denied, 419 U.S. 845 (1974). While the federal courts have consistently refused to compel unwilling experts to testify, they have frequently differed in their reasons for so ruling or have failed to articulate the reasons underlying their refusal.

On the one hand, some courts have taken the position that they lack any power to compel an expert to testify against his wishes. Cheatham Electric S. D. Co. v. Transit Development Co., 261 F. 792, 796 (2d Cir. 1919) (dictum); Smith v. United

States, 24 Ct. Cl. 209 (1889). The policy which underlies this view was clearly articulated in Smith v. United States, where the court reasoned:

"[A]n expert is one who does not testify as to occurrences which he has casually beheld, but as to his own self-acquired knowledge. There is no principle of law which allows a suitor to acquire the benefit of another man's knowledge or skill through the strategem of calling him as a witness."

This view accords with that taken by the courts of the State of New York which have held that they lack the power to compel the testimony of an unwilling expert. Reda v. The State of New York, 62 Misc. 2d 244, 308 N.Y.S.2d 558 (Ct. of Claims 1970); People ex rel. Kraushaar Bros. & Co. v. Thorpe, 296 N.Y. 223, 72 N.E.2d 165 (1947); and the federal courts have, on several occasions, looked to the law of the state in which they sit when faced with the problem, Boynton v. R. J. Reynolds Tobacco Co., 36 F. Supp. 593 (D. Mass. 1941); Cold Metal Process Co. v. United Engineering and Foundry Co., 83 F. Supp. 914 (W.D. Pa. 1938), aff'd, 107 F.2d 27 (3d Cir. 1939).

Other federal courts, while refusing to compel an expert to testify in the cases which were before them, have suggested that the power to subpoena an unwilling expert to testify might exist in exceptional situations where it was necessary for the purpose of justice. This view was first expressed in Ex parte Roelker, 1 Sprague 276, Fed. Cas. No. 11995 (D.C. Mass. 1854), in which the court declined to compel the attendance of an interpreter in a criminal proceeding:

"\* \* \* When a person has knowledge of any fact pertinent to an issue to be tried, he may be compelled to attend, as a witness. In this, all stand upon equal ground. But to compel a person to attend, merely because he is accomplished in a particular science, art, or profession, would subject the same individual to be called upon, in every cause in which any question in his department of knowledge is to be solved. Thus, the most eminent physician might be compelled, merely for the ordinary witness fees, to attend from the remotest part of the district, and give his opinion in every trial in which a medical question should arise. This is so unreasonable that nothing but necessity can justify it. \* \* \*" (Emphasis supplied.)

More recently, in Boynton v. R. J. Reynolds Tobacco Co., supra, in declining to order an expert to testify, the court cited as controlling a state decision\* that held

"'The issuing of this warrant is a matter of discretion \* \* \* we should be slow to admit that the court would be without power to require the attendance of a professional or skilled witness, upon a summons duly served \* \* \* but such power would hardly be exercised unless, in the opinion of the court, it was necessary for the purpose of justice.'" (Emphasis supplied.) 36 F. Supp. at 594-5.

Essentially this same view was articulated in Carter-Wallace v. Otte, 474 F.2d 529 (2d Cir. 1972), cert. denied, 412 U.S. 929 (1973), which presented questions as to the admissibility of prior recorded expert testimony but also dealt tangentially with whether an expert can be forced to testify against his will. The issue arose under highly unusual circumstances, the flavor of which can only be grasped by a full reading of Judge Friendly's opinion. Briefly stated, the were as follows (474 F.2d 532-536):

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\* Barrus v. Phaneuf, 166 Mass. 123, 44 N.E. 141 (1896).

Plaintiff patentee was suing an alleged infringer who was insolvent at the time of the trial. On the question of the validity of the patent, defendant was represented only by house counsel unfamiliar with patent law who chose to present the case for invalidity solely by introducing the record made on the question by the United States in a prior case in which it had been sued for infringement by the same plaintiff. On appeal from a judgment of invalidity, plaintiff urged that it was error to permit this use of the prior recorded testimony of expert witnesses who had testified for the government (presumably willingly) and been cross-examined by plaintiff itself.

It was not contested that all but one of the criteria for acceptance of prior recorded testimony had been met. However, plaintiff argued that the final criterion, unavailability of the witness, could not be met because an expert is never subject to court process (474 F.2d at 535-6). On its face this argument seems quite self defeating. Unavailability would appear to be established, not avoided, by the proposition that an expert cannot be subpoenaed, and Judge Friendly took note of this anomaly.\* Nevertheless, the Court did discuss the question whether the experts could have been required to repeat their prior testimony (474 F.2d at 536):

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\* "In any event, even if Carter-Wallace were correct that a court cannot require expert witnesses to appear, this argument would seem to lead to the conclusion that an expert witness is 'unavailable' even if he is within the 100 mile radius of the court's usual subpoena powers, rather than to the result Carter-Wallace seeks." (474 F.2d at 536.)

"\* \* \* The weight of authority holds that, although it is not the usual practice, a court does have the power to subpoena an expert witness \* \* \*. Since the witnesses involved here had previously testified as to their opinions, it would seem that they could have been subpoenaed to repeat their testimony here."

Judge Edelstein obviously regarded this Court's dictum in Carter-Wallace as definitively resolving the question of whether Mr. Kaufman could be subpoenaed by the government. We submit that Carter-Wallace has been stood upon its head. There the interests of the experts were in no way involved. They had already testified, presumably willingly, and probably had no knowledge of, let alone interest in, the fact that their testimony was to be used again. Thus, the only interests to be considered by the Court in Carter-Wallace were the interests of the litigants, not the witnesses. Here, it is the witness himself, whose self-acquired expertise is to be commandeered, who seeks protection of his interests.

Moreover, even without consideration of the expert's interest, Carter-Wallace laid down criteria, wholly ignored by the court below, which had to be met before even prior expert testimony could be used again. Thus the Court concluded that (474 F.2d at 536-7):

"\* \* \* before the former testimony of an expert witness can be used, there should be some showing \* \* \* that no other expert of similar qualifications is available or that the unavailable expert has some unique testimony to contribute."

If these criteria are required as between the litigants, surely at least as much is required when the question is raised by

the expert. But Judge Edelstein applied no such criteria.\* Having concluded, solely on the basis of Carter-Wallace, that he possessed the authority to compel the testimony of an expert witness, Judge Edelstein determined that this authority should be exercised because United States v. IBM is an "exceptional case"\*\* in which "all of the relevant testimony that the parties, through their witnesses, can provide" is needed\*\*\* and because Mr. Kaufman's testimony "has promise to be highly productive and of assistance to the Court in the trial of this case."\*\*\*\*

Thus, Judge Edelstein substituted for the criteria laid down in Carter-Wallace two new criteria: (a) that the case in which expert testimony is compelled be "exceptional" and (b) that the testimony has promise of being "highly productive and of

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\* Indeed, Mr. Kaufman's case cannot meet such criteria. The proponent of the subpoena, the government, has not suggested the unavailability of other experts or the uniqueness of his expertise, and Mr. Kaufman's affidavit is affirmatively to the contrary on both points. See Affidavit of Felix Kaufman, sworn to September 2, 1975, Par. 10, Appendix to the Petition, Tab 2 and Appendix to the Briefs, P. 6A. In this circumstance, it must be assumed that there are plenty of available experts having all of Mr. Kaufman's qualifications.

\*\* Memorandum Decision filed December 8, 1975 at p. 6 ("District Court's Opinion"). See Appendix to the Petition, Tab 3 and Appendix to the Briefs, P. 32A. By this, Judge Edelstein presumably means that United States v. IBM is a major government antitrust case.

\*\*\* Memorandum Decision of December 4, 1975 denying motion to quash of Frederic G. Withington, another unwilling expert subpoenaed by the government. See Appendix to the Petition, Tab 4 and Appendix to the Briefs, P. 23A. In denying Mr. Kaufman's motion, Judge Edelstein characterized Mr. Kaufman's arguments as "substantially identical" to those raised by Mr. Withington and suggested that "the reasons and principles" set forth in the Court's memorandum denying Mr. Withington's motion were also applicable to Mr. Kaufman.

\*\*\*\* District Court's Opinion, p. 7. See Appendix to Petition, Tab 3 and Appendix to the Briefs, P. 33A.

assistance to the Court". In our submission, these criteria were irrelevant to the question before him and illusory for the protection of experts.

Certainly, the power of the Court to compel an expert should not turn upon whether the case in question is an "important" one or is one brought by the government. To the litigants, every case is important or, indeed, exceptional. How does one define such a criterion? By the significance of the issues requiring expert testimony?\* By the amount of money involved? We submit that such definitions are, and ought to be, foreign to our system of justice.

Nor is the fact that the expert's testimony might be "useful" or "productive" a factor which should be considered. If the District Court had been faced with the question of whether any expert testimony should be permitted, then the "usefulness" or "productiveness" of the expected testimony might properly have been considered. However, the issue which confronted Judge Edelstein was not whether any expert should be permitted to testify but whether a particular expert could be required to testify.

This distinction is crucial because of the differences between expert testimony and the testimony of an ordinary fact witness. Unlike the ordinary fact witness who is called upon to

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\* We do not denigrate the magnitude of the task confronting Judge Edelstein when we say that every case needs to be decided correctly and there are literally thousands of cases in which expert testimony will contribute to that end.

testify as to his peculiar knowledge of the facts, an expert need have no knowledge of the facts but rather is asked to draw upon his expertise to express an opinion upon the significance of the facts as they are explained to him. This means that the testimony of one expert witness is analytically no different than that of another and the testimony of one expert cannot be said to be more (or less) productive or useful than that of another. As Judge Friendly noted in Carter-Wallace (474 F.2d at 536), a particular expert's contribution, unlike that of a fact witness, is not unique and the failure of a particular expert to testify does not result in the loss of relevant evidence. While some expert testimony might be useful here, it can hardly matter to the court whether the testimony is that of Mr. Kaufman or of some other expert.

Thus, as Carter-Wallace suggests (supra, page 8), it might be proper to compel an expert to testify as to his opinions where no other expert was available or where the expert who refused to testify possessed some unique qualification not possessed by other experts who were available. These are the factors that should have been, but were not, considered below.

The factors actually considered below are, we submit, quite appropriate if the question were whether the Court should appoint its own expert pursuant to Rule 706 of the new Federal Rules of Evidence. On that question the importance or complexity of the case as conceived by the Court seems to us quite relevant. But the Rule is quite specific (706(a)) that:

"\* \* \* an expert witness shall not be appointed by the Court unless he consents to act \* \* \*."

It would be at least anomalous if the court below, which does not have the power to require the testimony of an unwilling expert of its own selection, could require the testimony of an unwilling expert selected by a party.\*

We cannot agree with Judge Edelstein's statement (made in connection with his denial of Mr. Withington's motion but presumably equally applicable to Mr. Kaufman) that "all that is being required of [an expert] \* \* \* is that he perform his duty to testify, impartially, in a case of national significance."

(Appendix to the Petition, Tab 4 and Appendix to the Briefs, . . 23A)\*\* What is being asked by the government is that an expert be deprived of his right to offer his services as he sees fit and his further right to be compensated for performing the services which are his livelihood.

Furthermore, it is submitted that Mr. Kaufman's expertise is a proprietary asset and that in requiring him to utilize that expertise on behalf of the government without his consent and

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\* While Rule 706(d) states that "nothing in this rule limits the parties in calling expert witnesses of their own selection," it is apparent that this subpart simply means that the failure of Rule 706 to discuss experts not appointed by the Court should not be taken to mean that only the Court may call expert witnesses.

\*\* It should be noted that the requirement that Mr. Kaufman testify is likely to involve a substantial interference with his professional practice even though he has not been asked by the government to perform any special preparations. Thus, his deposition has been noticed and a burdensome demand for documents served upon him by defendant IBM to prepare it for cross-examination at trial.

without compensation, the District Court has deprived Mr. Kaufman of his constitutional right to be justly compensated for any taking of his property for public purposes. See Fifth Amendment to the United States Constitution. While not specifically framed in constitutional terms, substantially this view was expressed in United States v. Howe, F. Cas. No. 15404a (D.C. Ark. 1881), in which the court refused to hold in contempt an expert witness who had refused to testify unless paid a reasonable compensation. The published report of that proceeding states that the court concluded that

"the skill and professional experience of a man are so far his individual capital and property that he cannot be compelled to bestow them gratuitously upon any party \* \* \* the public does not, any more than a private person, have a right to extort services from him in the line of his profession or trade."

See also Buchman v. State, 59 Ind. 1 (1877), which involved the construction of a provision in a state constitution which prohibited the taking of a person's "particular services" without compensation; but cf. Dixon v. People, 168 Ill. 179, 189, 48 N.E. 108, 110 (1897).

II. THE DISTRICT COURT'S DENIAL OF THE MOTION TO QUASH IS APPEALABLE AS OF RIGHT PURSUANT TO 28 U.S.C. § 1291

Mr. Kaufman's motion to quash clearly involves an order which is entirely collateral to and separable from the issues involved in the main action. As a non-party, Mr. Kaufman has no interest in the final outcome of this action and could obtain no redress on appeal from the final judgment. Thus, denial of his

motion to quash the government subpoena clearly falls within the ambit of Cohen v. Beneficial Loan Corp., 337 U.S. 541 (1949), in which it was held that an order which involves a matter which is entirely collateral to and separable from the merits of the action and finally determines a claim of right has sufficient attributes of finality to be appealable as a final judgment under 28 U.S.C. § 1291.\*

Cohen involved an appeal from an order denying the motion of a defendant in a shareholder's derivative suit brought in a federal district court to require the plaintiff to post security for costs in compliance with a state statute. On certiorari to the Supreme Court the question was presented whether this order had been properly appealed under 28 U.S.C. § 1291 since it was not an appeal from a final judgment terminating the action.

The Supreme Court held that appeal was proper. It noted that the District Court's action upon this application was concluded and closed and its decision final in that sense before appeal was taken.

The Court also noted

"Nor does the statute permit appeals, even from fully consummated decisions, where they are but steps towards final judgment in which they will merge. \* \* \* this order of the District Court did not

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\* 28 U.S.C. § 1291 provides that "the Courts of Appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States \* \* \* except where a direct review may be had in the Supreme Court." In light of the 1974 amendments to the Expediting Act there is no longer any question that a direct review by the Supreme Court is not available here.

make any step toward final disposition of the merits of the case and will not be merged in final judgment. \* \* \* This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to rights asserted in the action, too important to be denied review and too independent of the cause itself to be deferred until the whole case is adjudicated.

\* \* \*

"We hold this order appealable because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it."  
337 U.S. at 546, 547.

The District Court's denial of Mr. Kaufman's motion to quash presents circumstances which closely parallel those presented in Cohen. The District Court's action with respect to Mr. Kaufman's application is complete, its decision will not be merged in the final judgment in the action and the appeal involves an important question involving the power of the District Court.

However, cases in this Circuit have refused to permit appeal under § 1291 from an order denying a motion to quash a subpoena. U.S. v. Fried, 386 F.2d 691 (2d Cir. 1967); United States v. Fabric Garment Co., Inc., Eve Abrams Witness, 383 F.2d 984 (2d Cir. 196.); see also U.S. v. Ryan, 402 U.S. 530 (1971); but cf. United States v. IBM, 471 F.2d 507, 511 (2d Cir. 1972), reversed on other grounds, 480 F.2d 293 (2d Cir. 1973) (en banc); Covey Oil Co. v. Continental Oil Co., 340 F.2d 993 (10th Cir.), cert. denied, 380 U.S. 964 (1965).

Instead, these cases have held that the "final" order which is appealable is not the order denying the motion to quash but rather one adjudging the non-party in contempt for refusing to obey the subpoena.

It should be noted, however, that the continued applicability of this rule in this Circuit is far from clear following United States v. IBM, supra. In that case, Judge Moore rejected the contention that only by subjecting itself to a judgment of contempt could IBM obtain immediate appellate review of an order requiring it to produce documents which it contended were subject to the attorney-client privilege. Moreover, even if Fried has not been overruled by United States v. IBM, it does not bar an appeal in the present case.

The rationale which underlies the Fried rule was clearly expressed by Judge Friendly's opinion. In refusing to hear Fried's appeal, the Court noted that if it were to hold that the question of whether Fried's mental health would be jeopardized by testifying was appealable as of right under § 1291, the decision

"\* \* \* would open the door to countless appeals from orders heretofore uniformly deemed interlocutory, thereby swelling appellate dockets already too large and delaying trial calendars already too slow. In addition to orders compelling testimony before, during or after trial by witnesses who claim serious physical or mental ailments, the principle would embrace orders directing physical or mental examinations under F.R. Civ. P. 35(a) of persons who contend, as Fried earlier did, that such examinations would injure their health, and directing that a criminal or civil case proceed to trial despite alleged inability of a party to participate, \* \* \* Under the Covey Oil decision, claims of

serious pecuniary damage from discovery orders would also qualify." 386 F.2d at 695.

Obviously, the Court realized that this threatened inundation of appeals could be prevented by requiring an appellant to have risked the perils of contempt since most persons would undoubtedly forego a right of appeal rather than risk being held in contempt.

Judge Friendly noted, however, that Fried was easily distinguishable from Cohen v. Beneficial Loan Corp., supra. Since the collateral order appealed from in Cohen involved a question of law "which, once authoritatively determined, would hardly arise again" (386 F.2d at 695), there was no danger that the courts of appeals would be swamped with appeals as a result of the Cohen exception.

Judge Friendly's analysis strongly suggests that the questions involved here are presently appealable despite the Fried rule. The questions raised by Mr. Kaufman's appeal -- whether the District Court has the power to compel an expert to testify, and if so, the criteria which must be met before this power can be exercised -- unlike the questions of fact presented by Fried's appeal and the similar factual questions (such as burden or competitive injury from disclosure of trade secrets) typically presented by denials of motions to quash subpoenas, present important undecided questions of law which will not arise again once determined by this Court.

Thus, it is submitted that the collateral order exception to § 1291 gives Mr. Kaufman an appeal as of right and that this right of appeal attached upon the denial of Mr. Kaufman's motion to quash notwithstanding Fried and other cases which suggest that no right of appeal arises until Mr. Kaufman has been held in contempt.

III. THIS COURT HAS THE POWER TO CORRECT  
JUDGE EDELSTEIN BY WRIT OF MANDAMUS

If Judge Edelstein's denial of Mr. Kaufman's motion to quash is not presently appealable pursuant to 28 U.S.C. § 1291, this Court has jurisdiction to correct Judge Edelstein by issuing a writ in the nature of mandamus. Judge Edelstein's refusal to quash the subpoena served upon Mr. Kaufman is an error of a type which both satisfies the traditional criteria for the issuance of mandamus and justifies the issuance of the "supervisory" or "advisory" mandamus recognized by LaBuy v. Howes Leather Co., 352 U.S. 249 (1957); Schlagenhauf v. Holder, 379 U.S. 104 (1964), and their progeny.

As the Supreme Court noted in Schlagenhauf:

"The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction \* \* \*'  
Roche v. Evaporated Milk Assn., 319 U.S. 21, 26."

\* \* \*

"The writ is [also] appropriately issued, however, when \* \* \* there is a clear abuse of discretion, Bankers Life & Casualty Co. v. Holland [346 U.S. 379, 382-383 (1953)]  
\* \* \*" 379 U.S. at 110.

Thus, it seems clear that if Judge Edelstein lacked the power to compel an expert to testify under any circumstances, as certain federal cases and the Federal Rules of Evidence suggest and as is the case under the law of the State of New York and several other jurisdictions, a writ of mandamus must clearly issue. As the court held in SEC v. Krentzman, 397 F.2d 55, 59 (5th Cir. 1958):

"\* \* \* [T]he end result was that [the judge] \* \* \* exercised what he thought to be a discretionary power which he did not possess under § 208, which in our opinion makes mandamus appropriate."

In Krentzman, a district court judge denied the SEC the right to cross-examine witnesses and offer evidence in a bankruptcy proceeding. The Fifth Circuit held that the bankruptcy act conferred the right to participate in the proceeding on the SEC and therefore the district court judge had no authority to deny such participation. This Court's decision in Hilbert v. Dooling, 476 F.2d 355, cert. denied, 414 U.S. 878 (1973), is also squarely in point. There, the failure of a district court judge to follow the nondiscretionary requirements of a procedural rule compelled the issuance of a writ of mandamus.

In Schlagenhauf, the Supreme Court upheld the issuance of a writ of mandamus by the Court of Appeals noting that

"\* \* \* petitioner's basic allegation was lack of power in a district court to order a mental and physical examination of a defendant. That this issue was substantial is underscored by the fact that the challenged order requiring examination of a defendant appears to be the first of its kind in any reported decision in the federal courts under Rule 35 and we have found only one such modern case in the state

courts. The Court of Appeals recognized that it had the power to review on a petition for mandamus the basic, undecided question of whether a district court could order the mental or physical examination of a defendant. We agree that, under these unusual circumstances and in light of the authorities, the Court of Appeals had such power." 379 U.S. at 110.

Moreover, Schlagenhauf provides an additional basis for the issuance of a writ of mandamus here. Because the question of the circumstances, if any, in which a district court might be empowered to compel an expert to testify is a novel and important question, this Court has jurisdiction to issue a writ of mandamus even if it concludes that the district court does have the power to compel expert testimony. This jurisdiction exists because of the court's supervisory powers to provide the district court with guidelines as to the proper exercise of its powers and its inherent power to resolve important questions of first impression.

In Schlagenhauf, after noting that mandamus had properly issued as to the question of whether the Court had any power to order an examination of a defendant, the Supreme Court considered the question of whether the Court of Appeals had also had jurisdiction to consider the meaning of the requirements in Rule 35 that a party's health must be "in controversy" and that "good cause" must be shown before an examination could be taken.\*

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\* The petitioner had argued that even if Rule 35 gave the district court the power to order mental and physical examinations of a defendant, the court had exceeded its power. Whatever power the court had to order examinations existed only where petitioner's mental and physical condition were "in controversy" and where a showing of "good cause" had been made since both of these criteria were imposed by Rule 35 as preconditions to ordering a physical examination.

The Supreme Court concluded that because these questions were before the Court of Appeals on a petition which also made "a substantial allegation of usurpation of power" the court of appeals should have reached the question of Rule 35's requirements to settle "new and important problems."

This advisory mandamus has recently been utilized by the Court of Appeals for the District of Columbia in a case involving precisely the sort of error which Judge Edelstein has committed here.

In Colonial Times, Inc. v. Gasch, 509 F.2d 517 (D.C. Cir. 1975), the Court relied upon Schlagenhauf to issue a writ of mandamus to compel the district court to grant a motion permitting depositions to be recorded by other than stenographic means even though the court acknowledged that traditionally mandamus would hardly ever have been available to review a discovery order. The case involved the construction of F. R. Civ. P. 30(b)(4). That rule provides that the court may order that the testimony at a deposition be recorded by other than stenographic means and that the order, in addition to designating the manner of recording the deposition, may include other provisions to assure that the recorded testimony will be accurate and trustworthy. Judge Gasch denied the petitioner's motion for such an order in an opinion which stated that a departure from the ordinary methods of taking depositions should be permitted only where a manifest injustice would result from insisting on stenographic transcription and concluded that

"The court, in the exercise of its discretion, feels that the objection of the government, coupled with the desire for accuracy in the transcription of testimony overcomes the relatively small additional expense to plaintiff of recorded testimony for three depositions in the usual manner." Colonial Times, Inc. v. United States Postal Service, Civil No. 1633-73 (D.D.C. Filed Dec. 10, 1973). (Emphasis supplied.)

The Court of Appeals determined that the objections of the government and the ability of the petitioner to pay for stenographic transcriptions were not relevant and that ~~the~~ only relevant basis for denying such a motion would be a determination that an accurate record of the deposition could not be obtained by the alternative means proposed. The Court of Appeals noted that the district court had not made this sort of inquiry and decided that issuance of a writ of mandamus was required because

"The District Court misconceived the nature of its discretion under Rule 30(b)(4) and thus considered an irrelevant factor and did not consider certain relevant factors in making its decision. Thus, the Court's error went to the source of its power under Rule 30(b)(4) and is the type of error, though not in the class of errors, traditionally reviewable under mandamus." 509 F.2d at 525.

As in Schlagenhauf, the Court was also influenced by the fact that the "proper scope of the trial judge's discretion under Rule 30(b)(4)" was an issue of first impression. It perceived that a proper interpretation of Rule 30(b)(4) was important if the purpose of the rule was to be effectuated. By correcting the trial court's error the Court of Appeals could "contribute to the development of standards under Rule 30(b)(4)".

In conclusion, the Court noted that a writ of mandamus should issue

"because the issue of discovery involved is one of first impression and is important to the administration of discovery. The error asserted concerns a misapprehension of the basic purpose of the discovery rule in issue - that is, the use of irrelevant factors in decision and a failure to consider certain relevant factors - and its correction will provide direction to the District Court in developing standards under Rule 30(b)(4). Finally, the error may be significant to the particular case under review. If it is not, it is the sort of issue which is important to litigation in general but often lost to appellate review." 509 F.2d at 526.

Precisely this basis for issuing a writ of mandamus was followed recently in this Court. In Miller v. United States, 403 F.2d 77 (2d Cir. 1968), this Court granted a petition for a writ of mandamus in connection with the question of whether the trial court could enjoin the postconviction questioning of jurors. In granting mandamus the Court noted that it had never previously authorized an injunction against postconviction questioning. Thus, it concluded that the case involved a question of the district court's power. Since such a question existed, the Court concluded that it had jurisdiction to review by mandamus questions as to the circumstances in which such injunctions would be proper because these questions were new and important.

It should be noted that other courts have held that they could grant mandamus following the example of Schlagenhauf, even where no issue of power existed, solely because of the need for review of important questions of first impression. See e.g.,

In re Ellsberg, 446 F.2d 954, 956 (1st Cir. 1971); United States v. United States District Court, 444 F.2d 651 (6th Cir. 1971), aff'd, 407 U.S. 297 (1972); United States v. Hughes, 413 F.2d 1244 (5th Cir. 1969), vacated as moot sub nom. United States v. Gifford-Hill-American, Inc., 397 U.S. 93 (1970).

A similar use of the writ of mandamus seems particularly appropriate here. While Carter-Wallace, Boynton and In re Roelker suggest that under certain unusual circumstances a court might possess the power to compel an expert to testify, only Carter-Wallace directly discusses the circumstances under which this power might be exercised. As noted above, Judge Edelstein wholly ignored the criteria set forth in Carter-Wallace and selected new criteria of his own. These criteria, that the judge thinks his case is an important one and that he also thinks expert testimony would be helpful, could be satisfied in literally thousands of cases. They provide no guidelines at all and, if not corrected, could destroy the customary practice that experts should be retained rather than subpoenaed.

#### Conclusion

For the reasons set forth above, Felix Kaufman respectfully requests that this Court issue a writ of mandamus pursuant to 28 U.S.C. § 1651 and Rule 21, Fed. R. App. P., directing Chief Judge David N. Edelstein:

(1) to vacate his order filed December 8, 1975 denying Mr. Kaufman's motion to quash the government's subpoena, and

(2) to enter an order quashing and vacating the government's subpoena.

In the alternative, Mr. Kaufman respectfully requests that this Court grant his appeal pursuant to 28 U.S.C. § 1291 and reverse the decision of the court below.

Dated: New York, New York  
January 29, 1976

Respectfully submitted,

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